Scope Determinations

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Overview

- Multiple Scope Determinations
- Procurement Scope Determination
  - Changes Clause
  - General Guidelines
  - Case Examples
- Funding Scope Determination

Scope

- Air-A-Plane Corp. v. U.S., 408 F.2d 1030 (1969)

  "The basic standard…is whether the modified job was essentially the same work as the parties bargained for when the contract was awarded. Plaintiff has no right to complain if the project it ultimately constructed was essentially the same as the one it contracted to construct. Conversely, there is a cardinal change if the ordered deviations altered the nature of the thing to be constructed. Each case must be analyzed on its own facts and in light of its own circumstances, giving just consideration to the magnitude and quality of the changes ordered and their cumulative effect upon the project as a whole."

Multiple Scope Determinations

- Perfilio Memo, 19 May 1994
  - **“ ‘Within the scope’ for procurement law purposes is <u>not</u> identical to ‘within the scope’ for fiscal law purposes.”**
- Option

Multiple Scope Determinations

- Procurement/Competition in Contracting Act
  - Competitor viewpoint
    - Is it in the Solicitation?
  - In Scope
    - Within the scope of the competition
  - Out of Scope
    - New Procurement/J&A

Multiple Scope Determinations

- Procurement/Breach of Contract
  - Contractor viewpoint
    - Is it in the Contract?
  - In Scope – Equitable Adjustment
    - Within the scope of the original contract
  - Out of Scope
    - Cardinal Change/Breach/Increased Cost

Multiple Scope Determinations

- Funding
  - Funder's viewpoint (Congress)
    - Is this what we gave you the money for?
    - Bona Fide need
  - In Scope - Antecedent Liability
    - Expired Funds
  - Out of Scope
    - New Funds

Scope and the Changes Clause

- Changes clause –
  - Drawings, designs or specifications
  - Method of shipment/packing
  - Place of delivery
  - Description of services to be performed
  - Time of performance
- “within the general scope of this contract”

Scope and the Changes Clause

- Changes of a type covered by the Changes clause
  - Still need scope determination
- Changes of a type not mentioned in the Changes clause
  - Bilateral Agreement
    - Still need scope determination
  - Breach

Scope and the Other Clauses

- Clause with a defined item or service
  - Option
  - IDIQ
- Clause without a defined item or service
  - Services “within the scope of the contract”

General Guidelines

- Changes in specification – generally within scope
  - Does it change the function of the item being procured?
  - Does it add new capability to the item being procured?
  - Is it an R&D contract where changes were expected?
- Changes in quantity – generally out of scope

General Guidelines

- Other changes
  - Change in contract price?
  - Multiple changes – cumulative impact?
  - Type authorized by the Changes clause?

Competition

- Example 1
  - Matter of Engineering & Professional Services, Inc., 2002 Comp. Gen. Proc. Dec. P24 –in scope change
  - 10 year CECOM requirements contract for ruggedized and commercial off-the-shelf computer equipment – Common Hardware Software-2 (CHS-2) Program
  - Change in specifications – Army added a new item, ruggedized handheld computer (RHC). Previous supplier of similar item called handheld terminal unit (HTU) protested
  - “the request for proposals...informed all potential offerors of the broad scope of both the CHS-2 program, and the wide range of supplies...to be obtained under the contract”

Competition

- Example 2
  - Matter of L-3 Communications Aviation Recorders, 99-1 Comp. Gen. Proc. Dec. P18 – in scope
  - 2 year IDIQ contract w/options by CECOM to ARINC for Rapid Response to Critical Systems Requirements (R2CSR) Program
  - Contract to integrate new equipment technologies into existing system architectures
  - Change – Delivery order – acquire and equip KC-135s with cockpit voice recorders, flight data recorders, and emergency locator transmitters
  - Protest – production buy v. engineering and support services

Competition

- Example 2
  - Protestor – solicitation says “limited quantities” of hardware
  - Comp. Gen. – acquisition was provided for in addition to services
  - Comp. Gen. – noted in the presolicitation brief that KC-135s was specifically mentioned as one of the systems to be supported by the contract

Breach

- Example 1
  - Appeal of CTA Incorp., ASBCA, 2000-2 B.C.A. P30,947
  - Letter contract to provide logistical support for navigational training simulators w/option for upgraded "prototype" simulator and option for production of 12 upgraded simulators
  - Option Change – reduced the production option to 5 upgraded simulators
  - This was a cardinal change, a breach, but the contractor agreed to the change, so the contractor is left with an equitable adjustment.

Breach

- Example 2
  - Appeals of Action Support Services Corp., ASBCA, 2000 B.C.A. P30,701
  - Contract to supply 453 THM/TGs (target holding mechanism/tank gunnery) – changes view of tank target
  - Excessive changes – 325 ECPs and 797 NORs – only 56 ECPs were mandatory – all bilateral modifications
  - Court reviewed the number of changes, the magnitude and quality of the changes, the character and timing of the changes, the research and engineering resulting from the changes.
  - Within scope - Optional changes not material

Funding Scope Determination

- Three options
  - Option 1 – funds covering the current year
  - Option 2 – funds covering the year the contract was signed **(if you still have funds)**
  - Option 3 – funds covering some other year **(need special authority)**

Funding Scope Determination

- Bona Fide Needs Rule – Purchases will be paid out of the current funds for the year the bona fide need arose for those purchases.
  - Within scope of original contract – old need we just finally determined cost. Use original contract year funds.
  - Outside scope of original contract – new need requiring current year funds.

Funding Scope Determination

- Perfilio Memo

  “Not all contract modifications which cite the ‘Changes’ clause are born alike. We must segregate those where the bona fide need truly relates back to the underlying contractual obligations from which cite the ‘Changes’ clause as procurement authority, but where the bona fide need for the modification of the effort relates to the appropriation of a current fiscal year.”

Funding Scope Determination

- Within scope of the original contract
  - Overrun
  - Award Fees
  - Claims
- Antecedent liability/Relation back doctrine

Funding Scope Determination

- Outside scope of the contract
  - Additional quantities
  - Priced options for additional production
  - R&D incremental funding
  - Cost Overrun

Funding Scope Determination

- ECP
- Does it add new capability?
- Need beyond the originally expressed bona fide need?
- Could this be broken out into a separate contract?

The End